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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN ANDREW HENRIQUEZ, Defendant and Appellant.	H041840 (Santa Clara County Super. Ct. No. C1351219)

I. INTRODUCTION

Defendant Kevin Andrew Henriquez was convicted by plea of three counts of lewd conduct upon a child under 14 (Pen. Code, § 288, subd. (a))[1] and one count of contacting or communicating with a minor with the intent to commit a sex offense (§ 288.3, subd. (a)). The trial court suspended imposition of sentence and placed defendant on probation. After defendant indicated his objection to some of the probation conditions, the court stayed most of the conditions and scheduled the matter for a further hearing. In a subsequent October 30, 2014 hearing, the court rejected defendant's objections and imposed the probation conditions that had previously been stayed.

On appeal, defendant challenges probation conditions that (a) require waiver of the privilege against self-incrimination, participation in polygraph examinations, and waiver

[1] All further statutory references are to the Penal Code.

of the psychotherapist-patient privilege as part of his participation in a sex offender management program, and that (b) subject his electronic devices to a search.

For reasons that we will explain, we will affirm the October 30, 2014 order.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant met the victim online through a chat room and they later communicated through Facebook.[2] They met in person in December 2009, when defendant was 20 years old and the victim was 12 years old, and had sexual intercourse during this first encounter. They continued to communicate through Facebook. In those communications, defendant used an alias and on numerous occasions indicated that he wanted to meet to have sex with the victim. Over the course of more than a year, they had sex about 15 times.

A. *The Complaint and the Pleas*

In March 2013, defendant was charged by complaint with three counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 1-3) and one count of contacting or communicating with a minor with the intent to commit a sex offense (§ 288.3, subd. (a); count 4). In November 2013, defendant pleaded no contest to all four counts after the trial court gave an indicated sentence range of probation to three years in prison.

B. *The Sentencing*

On October 16, 2014, the trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve 12 months in county jail. He was ordered to register as a sex offender pursuant to section 290. Other probation conditions included the following.

The trial court ordered defendant to complete an approved sex offender management program pursuant to section 1203.067, subdivision (b)(2). He was also

[2] As defendant was convicted by plea, the facts of his offenses are taken from the probation officer's report.

ordered to waive any privilege against self-incrimination and participate in polygraph examinations as part of the sex offender management program pursuant to section 1203.067, subdivision (b)(3). Defendant was further ordered to waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the probation officer pursuant to section 1203.067, subdivision (b)(4).

The trial court also ordered that defendant's "computer and all other electronic devices, including but not limited to cellular telephones, laptop computers or notepad shall be subject to forensic analysis search." Defendant was further ordered not to enter any social networking sites or post any ads, either electronic or written, unless approved by the probation officer. He was also ordered to report all personal e-mail addresses and websites with passwords to the probation officer within five days. The court further ordered defendant to keep a minimum of four weeks of Internet browsing history.

Defendant indicated that he objected to some of the conditions. The trial court stayed the conditions of probation other than the county jail sentence and scheduled the matter for a further hearing.

In late October 2014, defendant filed written objections to the probation conditions. Relevant here, he objected to the probation conditions regarding the sex offender management program, which required (a) waiver of the privilege against self-incrimination, (b) participation in polygraph examinations, and (c) waiver of the psychotherapist-patient privilege, as unreasonable and unconstitutional. He also objected to the electronics search condition on the grounds that it violated his right to privacy and was unconstitutionally overbroad, but he did not provide any argument in support of these objections. The prosecution filed written opposition.

On October 30, 2014, a hearing was held on defendant's objections to the probation conditions. The trial court rejected defendant's objections and imposed the probation conditions that had previously been stayed.

III. DISCUSSION

A. *Sex Offender Management Conditions*

In his opening brief on appeal, defendant contends that the probation condition requiring him to waive his privilege against self-incrimination and to participate in polygraph examinations (see § 1203.067, subd. (b)(3)) is unconstitutionally overbroad and violates the Fifth Amendment. He also contends that the probation condition requiring waiver of the psychotherapist-patient privilege (see § 1203.067, subd. (b)(4)) is unconstitutionally overbroad and violates his right to privacy.

Our Supreme Court recently rejected similar challenges to the probation conditions required by section 1203.067, subdivisions (b)(3) and (b)(4). (*People v. Garcia* (2017) 2 Cal.5th 792 (*Garcia*).) In *Garcia,* the section 1203.067, subdivision (b)(3) probation condition required the defendant to " 'waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender management program' " (*Garcia, supra,* at p. 799) and the section 1203.067, subdivision (b)(4) condition required the defendant to " 'waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the Probation Officer' " (*Garcia, supra,* at p. 799).

As to the probation condition requiring waiver of any privilege against self-incrimination and requiring participation in polygraph examinations as part of the sex offender management program, the California Supreme Court rejected the defendant's claim that the condition required him to waive his Fifth Amendment privilege. (*Garcia, supra,* 2 Cal.5th at pp. 802-803.) The court construed the condition as requiring probationers to "answer all questions posed by the containment team fully and truthfully, with the knowledge that these compelled responses could not be used against them in a subsequent criminal proceeding." (*Id.* at p. 803.) The court explained that, so construed, the condition did not violate the probationer's Fifth Amendment rights, since "the Fifth Amendment does not establish a privilege against the compelled disclosure of

information; rather, it 'precludes the use of such evidence in a criminal prosecution against the person from whom it was compelled.' [Citation.]" (*Garcia, supra,* at p. 807.)

The California Supreme Court also rejected the defendant's claim that the probation condition was overbroad because the scope of the required polygraph examinations was "not limited to prior or potential sex offenses but would permit a polygraph examiner to ask 'anything at all, without limitation.' " (*Garcia, supra,* 2 Cal.5th at p. 809.) The court explained that the condition was "expressly linked to the purposes and needs of the sex offender management program" and thus was "limited to that which is reasonably necessary to promote the goals of probation," i.e., "criminal conduct related to the sex offender management program." (*Ibid.*)

As to the probation condition requiring waiver of any psychotherapist-patient privilege, the California Supreme Court found that the condition did not violate the defendant's right to privacy and that the condition was not unconstitutionally overbroad. (*Garcia, supra,* 5 Cal.5th at pp. 809-813.) The court first addressed the privacy issue, finding that the intrusion on the psychotherapist-patient privilege was "quite narrow," in that "a probationer's confidential communications may be shared only with the probation officer and the certified polygraph examiner." (*Id.* at p. 810.) The court noted that "[t]he waiver does not relieve the psychotherapist, probation officer, or polygraph examiner of their duty to otherwise maintain the confidentiality of this information." (*Ibid.*) With respect to the overbreadth issue, the court similarly noted that "[t]he required waiver [of the psychotherapist-patient privilege] extends only so far as is reasonably necessary to enable the probation officer and polygraph examiner to understand the challenges defendant presents and to measure the effectiveness of the treatment and monitoring program. [Citation.]" (*Id.* at pp. 811-812.)

As defendant acknowledges in a supplemental letter brief, *Garcia* resolves his challenges to the probation conditions requiring waiver of any privilege against self-incrimination, participation in polygraph examinations, and waiver of any

psychotherapist-patient privilege as part of the sex offender management program. As defendant further acknowledges, we are bound by *Garcia*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 702-703.) We therefore decline to strike or modify these conditions.

B. *Electronics Search Condition*

As a condition of probation, the trial court ordered that defendant's "computer and all other electronic devices, including but not limited to cellular telephones, laptop computers or notepad . . . be subject to forensic analysis search."

On appeal, defendant contends that the electronics search condition violates his right to privacy and is unconstitutionally overbroad. He argues that the condition is not necessary because other conditions already "ban [him] from social networking." Defendant contends that the electronics search condition "forces him to surrender his privacy rights in regards to matters that are not reasonably related to deterring criminal behavior. The condition should be re-written to less restrictive with more relevant and narrowly limited conditions." He also contends that an overbreadth challenge may be raised for the first time on appeal.

The Attorney General contends that the "breadth" of the electronics search condition "is necessary for a probation officer to ensure that [defendant] is complying with" the other conditions of probation which restrict his use of social networking sites, require him to report e-mail addresses and websites with passwords within five days, and require him to maintain a minimum of four weeks of Internet browsing history. The Attorney General further contends that a "narrower" condition "would risk becoming obsolete as technology changes."

A defendant may raise for the first time on appeal a facial constitutional defect in a probation condition, where the claim involves " ' "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.]' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); see also

id. at p. 887.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Id.* at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

This court rejected an overbreadth argument in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, where the challenged probation conditions required the defendant to (1) " 'provide all passwords to any electronic devices, including cell phones, computers or notepads, within [the defendant's] custody or control, and submit such devices to search at any time without a warrant by any peace officer,' " and (2) " 'provide all passwords to any social media sites, including Facebook, Instagram and Mocospace and to submit those sites to search at any time without a warrant by any peace officer.' " (*Id.* at p. 1172.) The defendant was a member of a criminal street gang who had promoted his gang on social media. (*Id.* at p. 1175.) This court rejected the defendant's claim that the probation conditions were "not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association." (*Id.* at p. 1175.) This court explained that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation conditions, outweighed the minimal invasion of his privacy. (*Id.* at pp. 1175-1176.)

In support of his overbreadth argument, defendant relies on *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*). In *Riley*, the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, *supra*, at p. 2493.) In so holding, the court

explained that modern cell phones, which may have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at pp. 2488-2489.) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley, supra,* at p. 2493.)

As *Riley* did not involve probation conditions, it is inapposite. Unlike the defendant in *Riley*, who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence, defendant is a probationer. "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.)

Defendant also relies on *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173 (*Lifshitz*), in which the court considered a probation condition requiring the defendant to consent to the installation of a monitoring system on his computer. (*Id.* at p. 177 & fn. 3.) The appellate court found that the record contained "very little information . . . about what kind of monitoring the probation condition authorizes" (*id.* at p. 190) and indicated the condition might be overbroad depending on whether the monitoring "focuses attention upon specific types of unauthorized materials," or on "all activities engaged in by the computer user" (*id.* at p. 191, fn. omitted). Since the *Lifshitz* court could not determine whether the condition was overbroad, it remanded the case so the district court could "evaluate the privacy implications of the proposed computer monitoring techniques as well as their efficacy as compared with computer filtering." (*Id.* at p. 193.)

In this case, defendant was not required to consent to computer monitoring. He also does not suggest how the probation condition imposed here could be more narrowly

tailored but still serve the state's interest in preventing him from contacting or communicating with a minor with the intent to commit a sex offense. Although other probation conditions restrict defendant's usage of electronics devices, the condition providing for the forensic search of his electronic devices is an important tool to ensure his compliance with those other conditions and to otherwise ensure that he is not contacting or attempting to contact minors in any fashion through his electronic devices. Since defendant used an electronic device to contact or communicate with a minor with the intent to commit a sex offense, where such contact or communication is itself an offense, the probation condition requiring defendant's electronic devices be subject to forensic analysis search is closely tailored to the purposes of the condition in this case. (See *Sheena K., supra,* 40 Cal.4th at p. 890.) The government's interest in ensuring defendant complies with the terms of his probation outweighs the intrusion on defendant's privacy rights. We therefore conclude that the electronics search condition is not overbroad.[3]

IV. DISPOSITION

The October 30, 2014 order is affirmed.

[3] The California Supreme Court has granted review in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, which involves the propriety of a probation condition requiring a minor to submit to an electronics search condition. Review has been granted in a number of other cases presenting similar issues, with briefing deferred. (See, e.g., *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted April 12, 2017, S240222.)

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.